IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, BROTHERHOOD OF RAILROAD AND STEAMSHIP CLERKS, FREIGHT HANDLERS AND EXPRESS AND STATION EMPLOYEES, ET AL.,

Petitioners,

No. 735 v.

FLORIDA EAST COAST RAILWAY COMPANY,

Respondent.

UNITED STATES OF AMERICA

Petitioner,

No. 736 v.

FLORIDA EAST COAST RAILWAY COMPANY,

Respondent.

FLORIDA EAST COAST RAILWAY COMPANY,

Petitioner,

No. 752 v.

UNITED STATES OF AMERICA

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF OF ASSOCIATION OF AMERICAN RAILROADS, AMICUS CURIAE, IN SUPPORT OF FLORIDA EAST COAST RAILWAY COMPANY

GREGORY S. PRINCE
PHILIP F. WEBER
Transportation Bldg.
Washington, D.C.
JONATHAN C. GIBSON
C. GEORGE NIEBANK, JR.
80 E. Jackson Blvd.
Chicago, Illinois 60604
Attorneys for Association of American Railroads,
Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Statute, Texts, Periodicals, etc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 750, 782, 783

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS AND STATION EMPLOYEES, et al.,
Petitioners,

No. 750 v.

FLORIDA EAST COAST RAILWAY COMPANY,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

No. 782 v.

FLORIDA EAST COAST RAILWAY COMPANY,
Respondent.

FLORIDA EAST COAST RAILWAY COMPANY,
Petitioner,

No. 783 v.

UNITED STATES OF AMERICA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF ASSOCIATION OF AMERICAN RAILROADS, AMICUS CURIAE, IN SUPPORT OF FLORIDA EAST COAST RAILWAY COMPANY

As a preface to the arguments we believe must be made in reply to the contentions in the briefs of the gov-

ernment and the unions, we should like to point out to the Court two very important things:

First, the unions to the contrary notwithstanding, no one claims in this case that any provisions of the Railway Labor Act as such are suspended during a strike. See Brief for Petitioners in No. 750, 27, 28, 31, 33. Florida East Coast and the railroad industry contend that otherwise applicable collective bargaining agreements are suspended during strikes, and temporary changes in working conditions made necessary if operations are to be continued during strikes are not changes as to which the Railway Labor Act requires bargaining.

Second, the government to the contrary notwithstanding, the fundamental question in this case does not turn on the right of railroads to make changes in the form of Florida East Coast's "Conditions of Employment" and "Uniform Working Agreement." See Brief for the United States, 21. Those are merely labels which may obscure the real question—the right of Florida East Coast and other railroads similarly situated to make temporary changes in working conditions in order to try to operate under emergency situations created by strikes. The bulk of the changes made by Florida East Coast were instituted on February 3, 1963, when it first commenced operations after the strike called on January 23, 1963. *Florida East Coast Railway Co.* v. *Brotherhood of Railroad Trainmen,* 336 F.2d 172, 179 (5th Cir., 1964). These had no labels and it is the right of railroads to make such changes that is the focal point of this case.

I. The Literal Construction of the Railway Labor Act Advocated by the Government and the Unions Overlooks and Obscures the Fact that There is No Status Quo Provision Applicable During a Lawful Strike.

The principal basis of the case presented by the government and the unions rests on the literal language of Sections 2 Seventh, 5 First, 6, and 10 of the Railway Labor Act, 45 U.S.C. §§ 152 Seventh, 155 First, 156, 160, which impose a series of four successive *status quo* requirements on parties to major disputes being handled thereunder.

The essential error of this view is that, in the last analysis, it assumes its conclusion by inserting in the Act a fifth *status quo* requirement omitted by Congress. In the course of doing so, it ignores the signals actually pointing to the opposite conclusion—to the construction of the Act we and Florida East Coast urge.

There is no room for question but that the Act—as the government says at page 18 of its brief—contains four separate provisions directing that the parties to major disputes must maintain the *status quo*. Thus, Section 6 requires that the *status quo* not be disturbed during periods of face-to-face conference and negotiation therein directed. This is the first level at which preservation of the *status quo* is mandatory. Unless the National Mediation Board comes into the dispute, the *status quo* must be observed throughout the period of conferences and for 10 days thereafter. The second level at which the *status quo* is to be maintained is also provided in Section 6. It applies if and so long as the dispute is in the process of mediation under the auspices of the National Mediation Board.

The third *status quo* directive is provided by Section 5 First, as referred to in Section 6. As its final act if it is unable to effect a settlement agreement, the Mediation

Board is directed to proffer arbitration to the parties. If either side declines to arbitrate, the *status quo* must not be disturbed for 30 more days after notice from the Board of failure of its mediatory efforts, unless in the interim the parties do agree to arbitrate or an Emergency Board is appointed by the President under Section 10.

If an Emergency Board is appointed, the fourth and last *status quo* mandate comes into play—that provided by Section 10.* These Boards are directed to report to the President within 30 days of their creation, and the parties are required to maintain the *status quo* after such Boards are named and for 30 days following their reports.

At the last point—30 days after Emergency Board reports—the Railway Labor Act falls silent, and here is where the argument of the government and the unions fails. After very carefully specifying that the *status quo* must not be disturbed throughout the four principal steps for handling major disputes, expiring 30 days after reports of Emergency Boards, there are no further *status quo* requirements. In order to sustain their position, the government and the unions actually have no alternative but to assume that in the Act Congress intended there to be a further *status quo* restriction—a fifth one—applicable only to the railroads. They must indulge in this assumption because plainly the Act itself has no *status quo* provision continuing after 30 days from the dates of Emergency Board reports. They are here asking this Court not only to accept their assumption but to elevate it to the status of law.

---

* If the parties agree to arbitrate under the provisions of Sections 7, 8, and 9 of the Act, 45 U.S.C. §§ 157, 158, 159, the threat to the *status quo* is, of course, automatically extinguished.

As we read the Act, its evident sense is squarely opposed to the assumption-argument of the government and the unions. After having specifically directed maintenance of the *status quo* at four separate levels of handling major disputes, Congress failed to direct that the *status quo* be observed beyond 30 days after Emergency Board reports. It certainly knew how to do so. The fact that under the circumstances it did not compels the conclusion that it did not mean the Act to have any such force after the fourth and final *status quo* requirement of Section 10.

The government, at pages 20-21 of its brief, concedes that there is a right of railroads to change conditions 30 days after Emergency Board reports, but it contends that this right is limited to making changes encompassed by the railroads' own proposals in the dispute in question. Not only is there no statutory warrant for this limitation, but it does not make sense. The government would have the unions free for the duration of the strike to reject not only the parts of the collective agreement directly involved in the dispute but, of necessity through their act of striking, the entire collective agreement as well. By the same token, the railroads must be free to treat collective agreements as suspended in their entirety by a strike.

The contention of the government and the unions that the Railway Labor Act requires railroads to bargain with the unions during a strike about the defensive measures it can utilize in exercise of its right of self-help is patently absurd. *National Labor Relations Board* v. *Abbott Publishing Co.*, 331 F.2d 209, 213 (7th Cir., 1964). It is no less unthinkable than the government and the unions would surely regard a rule that unions cannot strike without first processing demands that they be free to do so through the procedures of the Act. Congress adopted neither rule and this Court should so hold.

II. The Railway Labor Act Does Not Require Railroads to Bargain on Temporary Changes in Conditions Required to Meet Strike Emergencies—Pre-Strike Agreements do not Continue in Effect During a Strike.

The government asserts at p. 27 of its brief: "It is clear that the duty of a carrier to attempt to settle major disputes with representatives of the employees concerned is not suspended during a strike."

Taken at face value, we have no quarrel with this proposition—except that it introduces a serious element of confusion. The "major dispute" between Florida East Coast and the unions is that which precipitated the strike—over demands by the unions for wage rate increases and advance lay-off notices. We do not question that Florida East Coast has been under a continuing duty under the Railway Labor Act to bargain with the unions as to that dispute notwithstanding the strike.

This does not, however, mean—as the government assumes—that the railroad's right to make temporary changes in conditions to meet the strike emergency gives rise to a "major dispute" under the Railway Labor Act. That is the question of law presented to this Court. We contend, of course, that the law apart from the Act sanctions exercise of this right by the railroad and such exercise does not create a "major dispute" subject to bargaining under the Act.

In the same vein and on the same page of its brief, the government represents that: "It is . . . clear that employees who remain at work during a strike—regardless of whether they were pre-strike employees or are replacements and regardless of their union membership—are entitled to the benefits of any existing collective bargaining agreements covering the class or craft in which they work."

As far as this statement goes, we could not quarrel with it either because working employees are, of course, entitled to the benefit of any "existing collective bargaining agreements." But this begs the question whether pre-strike collective agreements continue as binding "existing collective bargaining agreements" during the strike. For all the reasons stated in our opening brief and this reply our position is that they do not. The government, on the other hand, claims that they do. In support, it advances footnote 20 on page 27 of its brief:

> "Thus, if a union called a strike against a carrier, and only half the union members went on strike, the carrier clearly could not deprive the nonstriking members or their replacements, of the benefits of wage and hour provisions in existing agreements, even by entering into individual agreements with employees. *J. I. Case Co.* v. *NLRB,* 321 U.S. 338; *Order of R. Telegraphers* v. *Ry. Express Agency,* 321 U.S. 342."

This is another example of spanning the gap from existing authority to new law by the bridge of assumption. It is anything but clear that a carrier could not deprive non-strikers or replacements for strikers of the benefits of pre-strike collective agreements, even by entering into individual agreements with employees. *J. I. Case Co.* v. *National Labor Relations Board,* 321 U.S. 332 (1944), and *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 342 (1944), cited by the government, are palpably inapposite. In neither case was a strike involved, so the Court was not confronted with any questions about rights of non-strikers or replacements under pre-strike collective agreements. Both cases settled no more than the rule that individual agreements cannot be used to defeat the duty to bargain collectively imposed by the National Labor Relations and the Railway Labor Acts nor to limit the terms of otherwise applicable collective agreements.

A case that is in point and which contradicts the government's assumption is *National Labor Relations Board* v. *Brown*, 380 U.S. 278 (1965). There this Court upheld the right of members of an employer's association not only to lock out their employees when only one employer was struck, but to continue to operate with replacements for regular employees who were willing to work. In other words, non-strikers were denied the benefits of collective agreements for the duration of the strike-lockout.

It is difficult to understand how a Congress that sanctioned the employer self-help upheld in *Brown* could be found to have restricted the self-help available to railroads to the extent urged by the government and the unions.

III. The Orderly Processes of Collective Bargaining Would Not Be Impaired by the Construction of the Act Advocated By Florida East Coast and the Railroad Industry.

The government and the unions express grave apprehension for the future of collective bargaining under the Railway Labor Act if it should be construed to approve railroads making temporary changes in working conditions in order to meet emergencies created by strikes.

That apprehension is baseless. As shown in Parts IV and V of this Reply, it has been the practice of railroads since before the turn of the Century to operate or attempt to operate notwithstanding strikes by employees and largely without regard to pre-strike collective agreements. That practice has continued unabated since enactment of the Railway Labor Act—and never questioned until now. At no time previously has this practice been thought to pose a threat to the objectives or policy of the Act. In this respect, the only comparatively unique feature of the case at bar is the relative degree of success of Florida East Coast in operating under strike conditions.

Analogous experience under the National Labor Relations Act similarly refutes the concern professed by the government and the unions. They appear to concede that employers subject to that Act are not bound by expired collective agreements during the course of a strike. And we take it that no one would dispute that the general practice of employers covered by the National Labor Relations Act is to try to run their businesses as best they can when confronted by strikes. But again we are aware of no claims that this has rendered ineffective the bargaining plan and scheme of that Act.

This means that the contention of the government that the rule contended for by Florida East Coast and the railroad industry would, if accepted, spell the end of meaningful collective bargaining under the Railway Labor Act is a makeweight argument that will not stand up. On the contrary, experience demonstrates conclusively that acceptance of the view of the law we urge would have no impact on bargaining under the Act as it has been conducted for 40 years.

IV. Contrary to Assertions of the Government, the General Practice of American Railroads Has Been to Operate or Try to Operate Notwithstanding Strikes.

In its brief, the government goes to some lengths to try to establish that it is not a matter of common practice for railroads to attempt to operate in the face of strikes. It attempts to overcome the absence of supporting authority by repeated assertions that such is a fact. Thus, at page 41 of its brief, it states:

> "In the railway industry, it has been highly unusual for a struck carrier to attempt to operate. The Annual Reports of the National Mediation Board for the

period 1955-1964, for example, show that there were approximately 50 strikes during that period in which railroads did not operate and no strike of consequence where operation was attempted. This practice surely indicates a recognition that any strike operations would have to be undertaken pursuant to existing agreements. . . .

"While operation during a strike has not generally been attempted in the railway industry, it has occurred among airlines. . . ."

At page 44, it says:

"Finally, procedures explicitly set forth in the Railway Labor Act enable a carrier either wholly to avoid or to settle a strike on equitable terms or, where deemed necessary (contrary to general railroad practice), to make provision for strike operations, without in the least departing from existing agreements and the statutory duty to bargain."

Finally, at pages 47-48 of its brief, the government, apparently having convinced itself of the existence of nonexistent practice and custom, says:

". . . And, in light of the industry-wide understanding pursuant to which carriers have not generally sought to reinstate operations during the course of a lawful strike, it is most likely that existing agreements, which contain no such specific provisions governing strike operation, do, in fact, incorporate a mutual understanding that strike operations will not be attempted contrary to the terms of these agreements."

We are delighted to see the propositions of law on which the government relies, depending on what it claims to be the accepted practice of the industry. When it realizes—as it soon must—that the practice is the opposite of what it claims before this Court, we trust it will not object to

our utilizing these same propositions incorporating what the practice really is.*

It is interesting to note that the only authorities the government can find to cite in support of its claim that the general practice of railroads is not to attempt to operate in the face of a strike are the Annual Reports of the National Mediation Board "for the period 1955-1964" (brief, 41)—and it does not accurately restate the relevant portions of those Reports. It says that these "show that

---

* This effort to make black appear white inevitably involves the government in some curious contradictions. For example, after stating that it has been "highly unusual" for a struck carrier to attempt to operate (brief, 41), the claim is advanced on the very next page (brief, 42) that:

> " . . . [N]umerous decisions of the railroad adjustment boards . . . reflect the clear understanding that whenever strike operation is undertaken, it must conform with existing collective agreements."

While the Adjustment Board decisions do not at all support the conclusion for which the government cites them—as we will presently show—we cannot but wonder how, if it is "highly unusual" for struck carriers to operate, "numerous" Adjustment Board decisions involving rights during strike operations could have been generated.

Also, at page 48 of its brief, the government calls attention to the stipulation of the Brotherhood of Railroad Trainmen in the *Trainmen's* case, 336 F.2d at 181, to the effect that Florida East Coast would be free to use supervisors to man trains when regular or qualified replacement personnel were not available because of the strike. Why does it suppose that the Trainmen made such a stipulation? We submit that the organization was doing no more than conceding what the railroads have always been regarded as free to do. Significantly, however, neither the government nor the unions party to the case at bar have made any such concession. On the contrary, the rule of law they would have this Court read into the Railway Labor Act contradicts the concession of the Brotherhood of Railroad Trainmen.

there were approximately 50 strikes during that period in which railroads did not operate and no strike of consequence where operation was attempted." *Ibid.*

We invite the Court's attention to the Reports themselves. Starting with the Twenty-First Annual Report for the fiscal year ended June 30, 1955, and continuing through the Thirtieth Annual Report for the fiscal year ended June 30, 1964, the National Mediation Board reported on a total of 62 strikes. As a rule, it does not state whether the railroad involved in any given strike attempted to operate. But solely on the basis of the text of the Reports in question, the Board indicated rather clearly if not specifically that operations were not attempted in only 7 of the 62 strikes. In 3 others, the Board might be taken to have implied that operations ceased altogether. Therefore, it seems that the most one could possibly claim for these Reports is that they show that in 10 strikes out of 62—not 50 out of 62—the railroads did not try to render any service.

On the other hand, in 5 instances reported by the Board, it specifically observed that notwithstanding strikes the railroads involved continued to render full or partial service. Twenty-First Annual Report, 5-6; Twenty-Third Annual Report, 4; Twenty-Fifth Annual Report, 10; Twenty-Sixth Annual Report, 12; Thirtieth Annual Report, 12. And, in making these observations the Board indicated nothing to the effect that it regarded it as unusual for a carrier to attempt to operate during a strike. This plainly indicates that the Board has not perceived anything out of the ordinary in a carrier attempting to operate notwithstanding a strike.

Particularly startling is the government's assertion that the Reports in question show that during the period cov-

ered there was "no strike of consequence where operation was attempted." It overlooks not only the serious 60-day strike on the Louisville and Nashville System reported in the Twenty-Third Annual Report but also the Florida East Coast strike itself reported in the Twenty-Ninth and Thirtieth Annual Reports.

We doubt that the government would dismiss the Louisville and Nashville strike—which for 60 days impaired (but did not completely shut down) rail service provided by the system in 13 states—as one of no consequence. And, most assuredly, the Florida East Coast strike is a significant one. In both instances, the National Mediation Board reported that the railroads were maintaining at least partial service in spite of the strike.

It seems, therefore, that the government is a bit wide of the mark in asserting that the Reports to which it refers reveals "no strike of consequence where operation was attempted." The fact is that these Reports show that in the two longest strikes on major railroads reported operations were not only attempted but actually conducted. And in neither case did the National Mediation Board find justification for expression of surprise. It recognized the accepted custom and practice to be what we say it is—most railroads do try to maintain at least partial operations notwithstanding strikes.

This is not to say that all railroads are able in all strikes to resume even limited operations immediately. How quickly and to what extent operations can be restored by a particular railroad depends on whether the strike caught it by surprise, whether there was time in advance to lay plans for operating, and how long the strike lasts. As a rule, a work stoppage will result in a nearly complete cessation

of operations for a short time until supervisors can be moved into position to resume operations. Thereafter, as the strike continues, more and more of the regular operations can be restored with return of some employees who tire of the strike and hiring of replacements. The experience of Florida East Coast in the case at bar is a typical example of a railroad shut down completely for a short period but later restoring service to a continually increasing extent.

While we are confident that the Annual Reports of the National Mediation Board confirm the practice and custom we assert—and certainly they do not support that claimed by the government—it may be helpful to turn to other sources.

The government limits its review of history to the last ten years. Even that does not lend any support to its position, but if history is to be utilized in the process of ascertaining the intent of Congress in adopting the Railway Labor Act in 1926 and amending it in 1934, experience of the last decade is not very instructive. It is necessary to go back and uncover the picture as it was developed in the years before the Act was passed, as it appeared in the early 20's and 30's, and as it unfolded thereafter.

In 1886, shopmen unsuccessfully struck the Missouri Pacific. The railroad was able to maintain some service because many strikers elected to return to work and other men were hired to take the places of those who did not. Middleton, *Railways and Organized Labor* (Railway Business Association, 1941) 27. A strike against the Burlington in 1888 likewise failed to shut the road down. *Chicago, Burlington & Quincy R. Co.* v. *Burlington, C. R. & N. Ry. Co.*, 34 Fed. 481 (C.C. Iowa, 1888). The Toledo, Ann Arbor & Northern Michigan Railroad was struck in 1893, but

nonetheless operated some trains. See *Toledo, Ann Arbor & Northern Michigan Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio, 1893); *In re Lennon*, 166 U.S. 548 (1897). The Union Pacific undertook to operate in spite of a strike against it in 1902. *Union Pacific R. Co.* v. *Ruef*, 120 Fed. 102 (C.C. Neb., 1902).

The Pullman Strike of 1894 was probably the most important of its era. It too shows that at that time the practice of railroads was to try to operate even though their employees were striking. One of the claims for relief asserted against Eugene V. Debs and other officers of the American Railway Union was to restrain them from interfering with efforts to operate by the railroads using employees who did not want to strike and others who were willing to take the places of strikers. *In re Debs*, 158 U.S. 564, 586 (1895). Middleton, *supra*, 32-40.

Nowhere does the prevailing practice or custom of the time appear more clearly than in the 1894 Tenth Annual Report of the Commissioner of Labor entitled "Strikes and Lockouts." H.R. Doc. No. 339, 54th Cong., 1st Sess. (1894). It is a comprehensive two-volume report of strikes in all industries and trades, including railroads, for the 7½ year period from January 1, 1887 through June 30, 1894, divided by states and years. For each strike included, the report lists in columnar form many items of detail. One of these columns shows whether the operation against which a strike was called was "Closed" or "Not closed." Another is headed "Strikers reemployed or places filled by others." Railroad strikes are listed under the "Transportation" category. And, as in the case of strikes in different industries, the report makes clear the efforts of railroad managements of the time to continue to operate despite work stoppages.

The railroads were under federal control during and immediately after World War I from December 28, 1917, to March 1, 1920, when the Transportation Act of 1920 became law. Middleton, *supra*, 63, 66. Union membership increased significantly in these years under the policies of the federal Director General of Railroads. *Id.*, 63-64. But there were still some strikes. Even in these instances, however, the government itself undertook to maintain operations and these work stoppages were ended by return of the men or their replacement. *Id.*, 65.

The comparatively short life of Title III of the Transportation Act of 1920 as the blueprint for its time of statutory railroad labor law was marked, among other things, by the biggest nationwide rail work stoppage in history—the Shopcraft Strike of 1922. Jones, Railroad Wages And Labor Relations 1900-1952 (Bureau of Information of the Eastern Railways, 1953) 78-81. That the railroads tried and were able to maintain a certain level of operations in spite of the work stoppage is a matter of record. *Id.*, 79-80; see *State* v. *Personett*, 114 Kan. 680, 220 Pac. 520 (1923). That everyone in the federal government was well aware not only of the strike but of the railroads' operations in spite of it is also a matter of record. On August 18, 1922, President Harding appeared personally before a joint session of Congress to report the situation. 62 Cong. Rec. 11538 (1922). While the procedures of the Transportation Act were criticized, no charges were leveled against the railroads for operating in the face of the strike. On the contrary, the President took the strikers sharply to task for interfering with the efforts of the railroads to operate. *Id.*, 11539.

Dissatisfaction with Title III of the Transportation Act of 1920 led to enactment of the Railway Labor Act of 1926, which, as amended (principally in 1934), is the Act with which we are dealing today. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, 40 (1957). One of the principal innovations of this measure was its provision for investigation of major rail disputes by emergency boards appointed by the President—found in Section 10 of the Act. 45 U.S.C. § 160. The history of this provision sheds light on the understanding not only of the railroads and the principal unions, but also on that of the Congress which passed it. The unions were reluctant to agree to Section 10 and its emergency board provisions because they were apprehensive about its 60-day *status quo* requirement— they were concerned about being required to give two months' advance notice which would afford the railroads an opportunity "to prepare for the event." LECHT, EXPERIENCE UNDER RAILWAY LABOR LEGISLATION (Col. Univ. Press, 1955) 54. What bothered the unions, of course, was giving the railroads a chance to lay careful plans for operating should there be a strike. They knew what the general practice had been prior to that time and they expected it to continue. Congress, having then only recently witnessed the Shopcraft Strike of 1922, was likewise well aware of the practice and unquestionably expected it to continue absent some specific statutory prohibition—a prohibition which was not then enacted and never has been adopted since.

In the years immediately following the 1926 Act, labor disputes on the railroads were resolved peaceably, with very few resorts to strikes. First Annual Report of the National Mediation Board, 8. Even at this time, however,

the practice of the railroads of operating or attempting to operate under strike conditions was readily acknowledged by those in the field. Thus, in its Second Annual Report, the National Mediation Board noted at page 2, one strike in the period reported on. It observed that in this instance, " . . . [I]t was the employees who were impatient of mediatory efforts. Their hurried decision to strike has resulted in their displacement by new employees and they have been out of employment for many months."

Strikes did not become an important railroad problem again until after the close of World War II. Lecht, *supra*, 189.* A threatened strike at the end of 1943 resulted in a brief seizure of the railroads by the government from December 27, 1943, to January 18, 1944. Jones, *supra*, 125-127. A series of later disputes were all finally resolved. In several of the most important ones, strikes were again averted by seizure. This remedy was utilized from May 17 to May 26, 1946, May 10-July 9, 1948, and, most importantly, from August 27, 1950, to May 23, 1952. Jones, *supra*, 133, 134, 140, 149, 158.

Account should be taken of two actual strikes in these years which did not lead to seizure. The most significant was a 2-day nationwide strike called on May 23, 1946 by

---

* There were a few strikes of present interest in the 30's and early 40's, however. The operating brotherhoods struck the Louisville and Arkansas Railway and the Louisville, Arkansas and Texas Railway on September 19, 1936, but the company announced that train service would continue on schedule. 101 Railway Age 459 (1936). The strike lasted until November 20, 1936. The Firemen struck the Monongahela Railway from April 30 to May 8, 1940, but train movements were continued throughout the strike at a level somewhat less than normal. 108 Railway Age 830 (1940). On December 28, 1941, the Firemen and the Trainmen struck the Toledo, Peoria and Western but supervisors were able to continue operations. 112 Railway Age 352, 425 (1942).

the Trainmen and the Engineers. A survey was later made of some 35 railroads to determine whether and to what extent they had continued operations during the work stoppage. Only 5 reported that they had been shut down. All the others had been able, by using supervisory personnel, to maintain some level of service. 120 Railway Age 1103-1113 (1946). The extent to which these railroads were able to provide service differed rather widely from one company to the next—as one would expect—but the significant thing is that most of the railroads involved tried and were able to operate to some degree.

The Firemen called a 6-day strike against the Pennsylvania, the Southern, the New York Central and the Santa Fe in May 1950. With the exception of the Pennsylvania, which was able to continue only emergency freight service, the railroads tried and were able to provide some passenger and freight service by use of supervisory personnel. 128 Railway Age 205 (1950).

We submit that this historical account decisively establishes that the general practice and custom of the industry is and always has been to operate or attempt to operate notwithstanding strikes. This was the history summed up in the testimony before the Presidential Railroad Commission in 1961 quoted at pages 20-21 of our opening brief. The incredible strike by the Brotherhood of Locomotive Firemen against 8 railroads confronting the nation as this is written confirms this practice—if confirmation be needed. Of the 8 struck railroads, 6 or 7 are continuing to provide such service as they can—the Pennsylvania, the Seaboard, the Illinois Central, the Missouri Pacific, the Central of Georgia, the Union Pacific, and perhaps the Grand Trunk Western. The Boston and Maine is apparently shut down and the Grand Trunk may be.

We know, of course, that times have changed since the 1880's, the beginning point of this historical account. But

the right to organize and bargain collectively and strike if necessary asserted by the unions is essentially the same today as it was in those early days. And, notwithstanding the fact that the ground rules of railroad labor relations have been refined through the years to the form in which they are presently expressed in the Railway Labor Act, the right of the railroads to resort to self-help by operating as best they can under strike conditions is likewise essentially the same as it has been through the years.

The basics of the Railway Labor Act were agreed to by the unions and the railroads. Their respective attorneys, working together, prepared the bill which was adopted by Congress as the Act of 1926. *California* v. *Taylor*, 353 U.S 553, 557-558 (1957). Both the unions and the railroads were fully cognizant of and never questioned but that the railroads would try to operate if and when their employees struck. Even more important perhaps is the fact we have previously noted that the Congress which approved the Act in 1926 had witnessed the Shopcraft Strike of 1922, during which the railroads had been able to operate—with varying degrees of success. If it had intended to curb or restrict this practice, we submit that it would have done so in such manner that there would be little or no question about it today. However, it did not do so in 1926 and has not done so since. It never intended the restriction which the unions and the government would now have this Court read into the Act.

On the basis of its erroneous assumption or assertion that railroads generally do not try to operate during strikes, the government contends (brief, 47-48) that collective agreements in the industry must be taken as incorporating a "mutual understanding that strike operations will not be attempted contrary to the terms of . . . agreements." With its assertion as to practice revised—as it must be—to reflect that railroads generally do try to

operate during strikes, we accept its view of the law corrected to reflect the true facts. This means that collective agreements in the industry must be read as incorporating a mutual understanding that strike operations will or may be undertaken without reference to the terms of collective agreements. This is an entirely acceptable legal theory endorsed by the government which may be taken as an alternative to the "suspended as a matter of law" theory outlined on page 25 of our opening brief.

V. The Government to the Contrary Notwithstanding, the Railroad Industry has Never Generally Assumed That Collective Agreements Continue in Force During a Strike.

Along with its repeated but erroneous assertions that railroads rarely attempt to operate under strike conditions, the government also flatly states that it is uniformly assumed in the industry that collective agreements remain in force during strikes. This is equally erroneous. At pages 40-41 of its brief, the government says:

> ". . . [C]arriers and the adjustment boards . . . have uniformly assumed that collective bargaining agreements remain in full force during a strike except for those provisions as to which changes have been proposed and fully negotiated with the unions, and that strike operations must conform to those agreements."

We regard it as significant that the only authorities cited for this proposition are a decision in a railroad bankruptcy case and the Bankruptcy Act itself. The utility of these sources escapes us except as a showing of the lengths to which the government must strain to find something—anything—to cite.

At page 42 of its brief, the government reports that:

> ". . . [N]umerous decisions of the railroad adjustment boards . . . reflect the clear understanding that whenever strike operation is undertaken, it must conform with existing collective agreements."

To sustain this representation, four Adjustment Board awards are referred to. The first cited is *Brotherhood of Railway Clerks* v. *Macon, Dublin & Savannah R. Co.*, 98 N.R.A.B. 730 (3d Div., 1961). It involved a claim by a clerk who was "furloughed" or laid off from May 1, 1956 to July 2, 1956 because of a strike by the Brotherhood of Railroad Trainmen. The basis of his claim was that while he was laid off his work was performed by one of the railroad's supervisory forces. He asserted that he was entitled to be paid because under allegedly applicable rules he should not have been furloughed if the work of his position remained.

The claim was denied.

Purporting to report the case, the government says:

> ". . . [T]he Board held that the carrier's action in furloughing some clerical employees during a two-month strike . . . was taken in full accordance with the Reduction of Force Rule in the Clerk's agreement which is similar to Rule 19 of FEC's agreement with its Clerks. The Board said that such contract provisions had been construed consistently to give the carrier the right 'to reduce forces by furloughing employees or abolishing positions during a strike *while railroad operations are practically suspended*' [emphasis added (by the government)], but cautioned that, even during a strike, 'the Carrier may not, under the pretense of abolishing positions, evade the application of an established rule.' Thus, the Board held that the carrier had taken steps to counteract the strike *in full compliance with its agreements.*"

The government therein represents that it quotes from two separate parts of the decision of the Board. An examination of the report of the case discloses, however, that neither expression quoted can be found in the decision of the Board. Both, in fact, are taken from the submission or brief of the railroad. The first—"to reduce forces . . ."

—appears at 98 N.R.A.B. at 738. The second—"the Carrier may not . . ."—is part of a prior award cited and quoted by the railroad. 98 N.R.A.B. at 739.

With respect to the "holding" of the case, in the quoted portion of its brief the government represents that the Board ruled that the carrier's action "was taken in full accordance with the Reduction of Force Rule in the Clerks' agreement which is similar to Rule 19 of the FEC's agreement with its Clerks. . . . [T]he Board held that the carrier had taken steps to counteract the strike *in full compliance with its agreements.*" (Emphasis the government's.)

The fact is the Board held no such thing.

The "Reduction of Force" Rule referred to by the government was, in the case in question, "Rule 14—Change in Force," quoted by the union in its submission. 98 N.R.A.B. at 733-734. This was the heart of the union's claim.

The actual decision of the Board, apart from routine mechanical recitals, takes up but a single 8-line paragraph in the report of the case. It appears in 98 N.R.A.B. at 741, and in its entirety reads as follows:

> "OPINION OF THE BOARD: There is a conflict in the record as to the amount of work involved in this claim however the amount of work performed by supervisors was nominal. *Rule 14 of the Agreement* [the "Reduction of Force" Rule referred to by the government] *has no application in this claim.* The Claimant's position was abolished and he was furloughed due to a Trainmen's strike during the period of this claim. *The Board finds that due to the Trainmen's strike that an emergency condition existed which justified the action taken by the Carrier during the period of claim.*" (Emphasis supplied.)

The disparity between the government's account of the decision and the actual ruling of the Board is such as to

render superfluous any additional observations on this score. We should like to point out, however, that applied to the case at bar this Award of the Adjustment Board means, as we here contend, that the emergency of a strike suspends the effectiveness of otherwise applicable collective agreements.

The second Adjustment Board decision cited by the government for the proposition that applicable agreements remain in effect during strikes (brief, 43, note) is *Brotherhood of Maintenance of Way Employees* v. *Missouri Pacific R. Co.*, 48 N.R.A.B. 583 (3d Div., 1950). That case involved a claim for time lost by non-striking maintenance of way workers who had been furloughed in anticipation of a strike by trainmen, enginemen, and yardmen. The strike actually took place and lasted a little more than a month.

Both the union and the railroad referred to a number of rules in the collective agreement claimed to support their respective positions. Not one of these rules specifically covered the rights of the railroad to furlough non-strikers when other employees struck.

The Board sustained the action of the carrier and denied the employees' claims. In so doing, it ruled that what had been done was in accordance with the agreement. The Board was able to rely on the agreement because it interpreted that document as including by necessary inference a right of all carriers to reduce forces under strike conditions. First, it noted that, "There is a presumption that action abolishing positions prior to settlement of a strike is bona fide." 48 N.R.A.B. at 605. Thereafter, the pertinent portion of its decision reads:

> ". . . [H]ere, as in all strike situations, we find the Carrier called upon to exercise its best managerial judgment in the face of a protracted and prolonged dispute with the operating personnel of its railroad. A

strike vote had been taken and a cessation of operations was inevitable. That the work stoppage would be of long duration reasonably could be foreseen, and later became an established fact. That the Carrier had a right to reduce forces by abolishing positions during a long drawn out strike while railroad operations were practically suspended is no longer an open question in this forum. . . .

"Having that right under its Agreement with the Organization, and the rules of construction promulgated by this Board, it is immaterial that there was no interruption of work covered by an independent contract. We are not here called upon to decide liability under another contract. . . ." 48 N.R.A.B. at 606.

In other words, the Board thus read into the collective agreement of non-strikers a rule—which might fairly be said to be a matter of the common law of the shop—to the effect that under the conditions of a strike emergency non-strikers can be laid off. The literal terms of the written collective agreement were put to one side in favor of this basic rule regarded as inherent in all such collective agreements. This is one way of restating the fundamental position of the railroad industry in the case at bar. That is—when some or all of their organized employees strike railroads have an inherent right not restricted in any way by the Railway Labor Act to operate as best they can under such temporary working conditions as are made necessary by the strike emergency and which are not otherwise unlawful.

The third Adjustment Board decision relied on by the government (brief, 43, note)—*Brotherhood of Maintenance of Way Employees* v. *St. Louis Southwestern Ry. Co.*, 48 N.R.A.B. 291 (3d Div., 1950)—is, with a single exception, the same as the second just reviewed. The exception is that it involved a claim by maintenance of way employees who had been laid off in anticipation of a threatened strike

which never materialized instead of in anticipation of a strike which later actually took place. The result, however, was the same—the action of the railroad was sustained. This means that the threat of a strike is sufficient to enable a railroad to take emergency measures to meet it.

The fourth and last Adjustment Board decision cited and relied on by the government (brief, 43, note) is *Brotherhood of Maintenance of Way Employees* v. *Atlanta and West Point Railroad,* 39 N.R.A.B. 564 (3d Div., 1948). It is an unusual case involving lay-offs during a one-day strike. The Board noted that the record was lacking information as to just what the carrier had done. 39 N.R.A.B. at 569. However, on the basis of the record as it stood, the Board found as a matter of fact that the work of the employees laid off had not ceased and, therefore, their lay-offs had been improper. The decision is not instructive on the matters before this Court in the case at bar.

This analysis discloses that the Adjustment Board decisions relied on by the government not only fail to sustain the proposition for which they are cited but actually support the contentions of Florida East Coast and the railroad industry.

The real basis for the assertion of the government here in question is demonstrably no more than another assumption. Its claim on page 41 of its brief that it is "highly unusual" for a railroad to attempt to operate under strike conditions is followed by this observation:

> " . . . This practice surely indicates a recognition that any strike operations would have to be undertaken pursuant to existing agreements."

In other words, the government assumes that operations under strike conditions are not attempted because it would

be so difficult to do so if existing agreements had to be complied with. We agree with the evident premise that strike operations of any consequence would be virtually impossible if pre-strike agreement conditions had to be maintained. But since we have shown—contrary to the government's claim—that it is not at all unusual for a railroad to attempt to operate as best it can under strike conditions, we can hardly agree that this reflects an understanding that pre-strike collective agreements remain in full force and effect during work stoppages. Instead, pursuing the same line of reasoning as the government, we conclude that the general practice of attempting to operate notwithstanding strikes demonstrates a settled understanding of railroads and unions alike that pre-strike agreement conditions are not applicable during work stoppages to striking crafts or to employees in crafts observing the picket lines of the strikers.

The actual practice permits of no other conclusion. If pre-strike agreements had to be observed during work stoppages, no supervisor could move the first passenger car or the first pound of freight and no unorganized employee could do the first piece of paperwork within the scope of the positions of strikers or others refusing to work.

VI. Decisions Under the National Labor Relations Act Announcing Federal Labor Policy Cannot be Distinguished.

Part V, E, pages 25-39, of our opening brief is devoted to a showing that the decision of the Court of Appeals in the case at bar is inconsistent with the federal labor policy enunciated by other Courts of Appeals and by this Court in cases arising under the National Labor Relations Act.

The government and the unions dispute the applicability of these decisions—although apparently not on the same grounds. Essentially, the unions' position, as stated at page 35 of their brief, is that "the whole scheme and policy" of the National Labor Relations and Railway Labor Acts are "irreconcilable and inconsistent." In reply, we need neither repeat nor expand upon the authorities to the contrary cited at pages 26-28 of our brief. Suffice it to say that it is well settled that the two acts are but different methods of implementing a generally uniform federal labor law policy.

The government takes a somewhat different tack, in its extensive footnote 27 at pages 38-40 of its brief. It seems to acknowledge—albeit grudgingly—a basic conflict of policy between the Court of Appeals in the case at bar and decisions under the National Labor Relations Act. At the same time, it is rather difficult to ascertain just what the government thinks the law under the National Labor Relations Act is. For example, on page 39 of its brief, it says:

> ". . . [W]here deviation from existing working conditions have been permitted during a strike under the NLRA, the situations have uniformly been ones in which no collective bargaining agreements have existed between the union and the employer." (Emphasis supplied.)

In this, the government seems to have overlooked *National Labor Relations Board* v. *Abbott Publishing Co.*, 331 F.2d 209 (7th Cir., 1964), *Pacific Gamble Robinson Co.* v. *National Labor Relations Board*, 186 F.2d 106 (6th Cir., 1950), *National Labor Relations Board* v. *Brown*, 380 U.S. 278 (1965), and *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300 (1965), in each

of which employer unilateral action in the face of a strike was approved and in each of which there had been a collective agreement prior to the strike. These cases are discussed at pages 30-37 of our brief.

Perhaps the government means to say that because prestrike collective agreements had expired in most of these cases they are to be distinguished from situations arising under the Railway Labor Act where the almost invariable practice of the parties (although in no way required by the Act) is to have "continuing" agreements effective until changed in accordance with the Act. But, as we have pointed out at page 26 of our brief, this is "a point of technical difference with no substantial legal distinction." Under our view of railroad labor law, "continuing" agreements common to the industry are suspended for any periods during which they are repudiated as charters for the employer-employee relationship by strikes of unions and employees they represent. As suspended agreements they are of no more legal effect than "expired" agreements.

One of the very recent cases cited by the government on page 39 of its brief is particularly significant—*National Labor Relations Board* v. *Tom Joyce Floors, Inc.*, 353 F.2d 768 (9th Cir., 1965). The Court of Appeals there ruled that under the circumstances of the record before it an employer failed to discharge its duty to bargain under Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act when it paid replacements for striking workers more than its last offer to the union representing the strikers. The government cites this case as authority for the proposition that ". . . [A]ny unilateral action which is not reasonably necessary to maintain strike operations would be clearly unlawful." By no stretch of the imagination, however, does the case stand for a rule that employers sub-

ject to the National Labor Relations Act have their hands tied by pre-strike conditions when they exercise their right of self-help. On the contrary, it points up clearly the very rule we are contending for here. The Ninth Circuit observed:

> "... The [Supreme] Court in *Katz* did indicate that there might be circumstances which the Board could or should accept as justifying unilateral action. ...
>
> "The wages paid the replacements by Joyce were greater than those offered during negotiations. *The company offered no evidence to the effect that the higher rate was necessary to secure replacements during the strike, or that for any other reason the higher rate was instituted as a temporary measure in response to an emergency situation created by the strike.* Moreover, most of the hiring of replacements at the higher rate occurred after Joyce refused to bargain about the hiring arrangement proposed by the union. 353 F.2d at 772. (Emphasis supplied.)

Thus, even though it ruled against the employer on the basis of the unique facts before it, the Court of Appeals squarely acknowledged that an employer subject to the National Labor Relations Act is free, when confronted by a strike, to take such temporary unilateral action as is necessitated by the emergency created by the strike. That really is all we are contending for the railroads under the Railway Labor Act in the case at bar.

Despite the recent date of this *Tom Joyce Floors* case, the government appears to be trying to cast some doubt on the soundness of that part quoted above "in light of" this Courts decisions in *National Labor Relations Board* v. *Katz*, 369 U.S. 736 (1962), and *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963). This doubt is just a smokescreen. The Ninth Circuit was not only aware of but, as indicated in the quote from its opinion, relied in part on

Katz while perceiving the *caveat* of *Erie Resistor*. To our minds, *Erie Resistor*, involving an employer effort to award superseniority to non-strikers to continue in effect after the conclusion of a strike, presents a very different problem from and is not relevant to temporary changes in conditions required to meet a strike emergency.

Packinghouse Workers v. *Needham Packing Co.*, 376 U.S. 247 (1964), cited at page 40 of the government's brief, is not in point. It simply stands for the proposition that the employer there had, by a very broad one-sided arbitration agreement, contracted away its unilateral right to discharge employees, even when they walk out in violation of a no-strike clause.

The remaining bases upon which the government would distinguish National Labor Relations Act authorities warrant no further comment than that at page 26 of our brief.

In this connection, we should perhaps make it clear that we are not here contending that the refinements of the labor law prescribed by the National Labor Relations Act in specific provisions interpreted and applied by the courts are likewise to be applied in the railroad labor field. All we are claiming is that the basic policies of the National Labor Relations and Railway Labor Acts are essentially the same. For present purposes, the policy with which we are principally concerned is that which leaves employers and unions free to the maximum extent not restricted by Congress in their resort to self-help when bargaining as prescribed by the Acts has failed to produce agreement. The decision of the Court of Appeals in the instant case is not in accord with that policy and should be reversed.

VII. CONCLUSION

The Court of Appeals has construed the Railway Labor Act so as to deprive the entire railroad industry of one of the most important aspects of its right to resort to self-help when its employees strike. This right—to operate or attempt to operate for the duration of a strike under temporary working conditions different from those specified in pre-strike collective agreements—has been exercised without question for generations. There is nothing in the Act to indicate directly or indirectly that Congress intended to limit or restrict this right. It is beyond the province of the courts to read such an intention into the Act and they should not do so.

The decision of the court below should be reversed.

Respectfully submitted,

GREGORY S. PRINCE
PHILIP F. WELSH
Transportation Bldg.
Washington 6, D.C.

JONATHAN C. GIBSON
C. GEORGE NIEBANK, JR.
80 E. Jackson Blvd.
Chicago, Illinois 60604
Attorneys for Association of American Railroads Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that the foregoing reply brief has this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses as hereafter listed, air mail postage prepaid.

Attorneys for the United States:

Honorable Thurgood Marshall
Solicitor General
United States Department of Justice
Washington, D.C. 20530

Honorable John W. Douglas
Assistant Attorney General
Civil Division
United States Department of Justice
Washington, D.C. 20530

Howard Shapiro, Esq.
Civil Division
United States Department of Justice
Washington, D.C. 20530

Walter Fleischer, Esq.
Civil Division
United States Department of Justice
Washington, D.C. 20530

William J. Hamilton, Jr., Esq.
Assistant U. S. Attorney
Main Post Office Building
Jacksonville, Florida

Attorneys for Florida East Coast Railway Co.:

William B. Devaney, Esq.
George B. Mickum, III, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

J. Turner Butler, Esq.
814 Florida Title Building
Jacksonville, Florida 32202

Attorneys for the Unions:

Lester P. Schoene, Esq.
Schoene & Kramer
1625 K Street N.W.
Washington, D.C.

Neal Rutledge, Esq.
Allan Milledge, Esq.
Richard L. Horn, Esq.
Rutledge & Milledge
601 Flagler Federal Building
111 Northeast First Street
Miami, Florida

April 7, 1966

C. George Niebank, Jr.
Attorney for Association
of American Railroads,
Amicus Curiae